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In the

Supreme Court of the United States

TERM, 1971

No. 71-95

AVM CORPORATION AND SHOUP VOTING MACHINE CORPORATION,

Petitioners,

v.

DATAMEDIA COMPUTER SERVICE, INC.,

Respondent.

Petition of Shoup Voting Machine Corporation for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	4
Prayer	7
Proof of Service	7
Appendixes:	
Appendix A (Opinion Below)	A-1
Appendix B (Judgment Below)	B-1

Cases

Page

City of Philadelphia v. Morton Salt Co., 248 F. Supp. 506, 509-510 (E.D. Pa. 1965) 5

Commonwealth Edison Co. v. Federal Pac. Elec. Co., 208 F. Supp. 936, 939, 943 (N.D. Ill. 1962) 5

Eastland Constr. Co. v. Keasby & Mattison, 358 F. 2d 777 (9 Cir. 1966) 5

Gem Corrugated Box Corp. v. Mead Corp., 189 F. Supp. 584, 586 (S.D. N.Y. 1960) 5

Newmark v. Abeel, CCH Trade Cases 1952 par. 67, 268 (S.D. N.Y. 1952) 5

R. J. Coulter Funeral Home, Inc. v. National Burial Ins. Co., 192 F. Supp. 522 (E.D. Tenn. 1960) 5

Ross-Bart Port Theatre, Inc. v. Eagle Lion Films, Inc., 140 F. Supp. 401 (E.D. Va. 1954) 5

School Dist. of Philadelphia v. Kurtz Bros., 240 F. Supp. 361, 364 (E.D. Pa. 1965) 5

Schreiber v. Loew's Inc., 147 F. Supp. 319, 324 (W.D. Mich. 1957) 5

Sharp v. Commercial Solvents Corp., 232 F, Supp. 323, 329 (N.D. Tex. 1964) 5

Sunbury Wire Rope Mfg. Co. v. United States Steel Corp., 230 F. 2d 511, 512-513 (3d Cir. 1956) 5

United States v. National City Lines, 334 U.S. 573, 68 S. Ct. 9, 98 L. Ed. 1584 reh. den. 334 U.S. 862, 68 S. Ct., 92 L. Ed. 1781 (1948) 4

United States v. Scophony Corp., 333 U.S. 795, 92 L. Ed. 1091, 68 S. Ct. 855 (1948) 4, 6

Secondary Authority

	Page
2 Toulmin, Antitrust Laws 157 (1949)	5
1 Barron & Holtzoff, Federal Practice and Procedure, 1965 Supp. § 80	5
Comment, 1962 Wash. U.L.Q. 262, 265	5
Note, 37 N.Y.U.L. Rev. 268, 281n 89 (1962)	5

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DATAMEDIA COMPUTER SERVICE, INC.,

Respondent.

Petition of Shoup Voting Machine Corporation for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Shoup Voting Machine Corporation, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit (Appendix A, *infra*, p. A-1) reversing the judgment of the United States District Court for the Northern District of

Texas (Appendix B, *infra*, p. B-1) and remanding the case for trial on the merits.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals, reported at 441 F. 2d 604 (5 Cir. 1971) is printed in Appendix A. The judgment of the District Court is printed in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on April 19, 1971, and rehearing was denied on May 18, 1971 (Appendix A, p. A-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether Petitioner Shoup was "transacting business" within the Northern District of Texas at the time suit was filed within the purport of the venue provision of the Clayton Act (15 U.S.C. § 22).

STATUTES INVOLVED

The venue provision of the Clayton Act, the application of which is in question in this case, reads in pertinent part:

> "Any suit, action or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; * * *"

15 U.S.C. § 22.

STATEMENT

Respondent, Datamedia Computer Service, Inc., was incorporated in Texas on October 28, 1968. On March 21, 1969, Respondent filed an antitrust action in the Northern District of Texas against Petitioners AVM Corporation and Shoup Voting Machine Corporation. Petitioner AVM Corporation is a Delaware Corporation with its principal place of business in Jamestown, New York. Petitioner Shoup Voting Machine Corporation is a Pennsylvania Corporation with its principal place of business in Bala Cynwyd, Pennsylvania.

After completion of extensive discovery on the issue of venue on June 20, 1970, the trial court dismissed the action for want of venue in the Northern District of Texas, holding "* * * that neither AVM or Shoup was transacting business in the Northern District of Texas at the time this action was filed, or at the time the injury to plaintiff is alleged to have occurred, within the meaning of 15 U.S.C. § 22, * * *". (Appendix B, p. B-3). The trial court's decision was based on specific fact findings on the issue of transaction of business in the Northern District of Texas; there was no finding that *any* activity by either Petitioner occurred in the forum district in 1969 or thereafter.

In its decision reversing the trial court's dismissal and remanding the case for trial on the merits, the Fifth Circuit mentioned *no* activity of either Petitioner allegedly occurring during 1969 or thereafter and discussed only the *de minimus* activities of Petitioners in 1968 and before. It is

particularly significant that most of the allegations upon which Respondent relied for venue in the Northern District of Texas concern activities that occurred prior to the very existence of Respondent.

REASONS FOR GRANTING THE WRIT

The decision below raises critical questions regarding federal jurisdiction, practice and procedure which are of fundamental importance far beyond the particular parties and facts involved.

That venue is often of crucial importance in antitrust litigation long has been recognized by this Court. Largely for this reason, the Court in *United States v. National City Lines*, 334 U.S. 573, 68 S. Ct. 9, 98 L. Ed. 1584 reh. den. 334 U.S. 862, 68 S. Ct., 92 L. Ed. 1781 (1948) refused to extend the doctrine of *forum non conveniens* to Clayton Act § 12 (15 U.S.C. § 22).

The applicable test for determining venue in antitrust cases has been clouded since the decision of this Court in *United States v. Scophony Corp.* 333 U.S. 795, 92 L. Ed. 1091, 68 S. Ct. 855 (1948). While the statute speaks in the present tense, conferring venue in any district wherein the defendant "transacts business," in *Scophony* the Court placed emphasis on the time of the accrual of the cause of action stating with regard to the expansion of venue by the enactment of Clayton Act § 12 (15 U.S.C. § 22):

> "[a] foreign corporation no longer could come to a district, perpetrate there the injuries outlawed and then by retreating or even without retreating to its headquarters, defeat or delay the retribution due."

333 U.S. at 808, 68 S. Ct. at 862, 92 L. Ed. at 1101.

Many courts, relying on this statement by the Supreme Court in *Scophony* have held that the controlling point in time for venue under the Clayton Act is when the cause of action arose.[1] Others, basing their interpretations on the simple fact that the statute speaks in the present tense have held that under Clayton Act § 12, the controlling venue facts are those existing at the time of the institution of suit.[2] Another argument advanced for applying the test to facts existing at the time of the commencement of suit is that, since venue is concerned with the parties' convenience in litigating, the factual status as of the commencement of action should control.[3]

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[1] See, e.g., Eastland Constr. Co. v. Keasby & Mattison, 358 F. 2d 777 (9 Cir. 1966); Sharp v. Commercial Solvents Corp., 232 F. Supp. 323, 329 (N.D. Tex. 1964); R. J. Coulter Funeral Home, Inc. v. National Burial Ins. Co., 192 F. Supp. 522 (E.D. Tenn. 1960); Ross-Bart Port Theatre, Inc. v. Eagle Lion Films, Inc., 140 F. Supp. 401 (E.D. Va. 1954); and see Comment, 1962 Wash. U.L.Q. 262, 265.

[2] See, e.g., Sunbury Wire Rope Mfg. Co. v. United States Steel Corp., 230 F. 2d 511, 512-513 (3d Cir. 1956); City of Philadelphia v. Morton Salt Co., 248 F. Supp. 506, 509-510 (E.D. Pa. 1965); School Dist. of Philadelphia v. Kurtz Bros., 240 F. Supp. 361, 364 (E.D. Pa. 1965); Commonwealth Edison Co. v. Federal Pac. Elec. Co., 208 F. Supp. 936, 939, 943 (N.D. Ill. 1962); Schreiber v. Loew's Inc., 147 F. Supp. 319, 324 (W.D. Mich. 1957); Newmark v. Abeel, CCH Trade Cases 1952 par. 67, 268 (S.D. N.Y. 1952); see also Gem Corrugated Box Corp. v. Mead Corp., 189 F. Supp. 584, 586 (S.D. N.Y. 1960); and see 2 Toulmin, Antitrust Laws 157 (1949); Note, 37 N.Y.U.L. Rev. 268, 281 n 89 (1962).

[3] See 1 Barron & Holtzoff, Federal Practice and Procedure, 1965 Supp. § 80, p. 204 where Professor Wright states with respect to the general venue statutes (28 U.S.C. § 1391(c)):

> "* * * since venue is an attempt to provide for the convenience of the parties, it would seem that the status as of the commencement of the action, rather than some earlier time, should control * * *."

In this case, the district court decided the issue of transaction of business with respect both to the time of filing and the time of the alleged accrual of the cause of action (Appendix B, p. B-3). The court of appeals below, in reversing the district court, did not comment on this dual finding, but simply held that the Defendants, Petitioners here, were transacting business in the forum district at the time suit was instituted. Both because of the wrongness of this decision [4] and because of the opportunity to remove the uncertainty that has clouded the issue of venue under the Clayton Act since the *Scophony* [5] decision in 1948, by clarifying the point in time with reference to which the issue of transaction of business should be decided, this petition should be granted.

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[4] See also the companion brief of Petitioner AVM Corporation.

[5] United States v. Scophony Corp. 333 U.S. 795, 92 L. Ed. 1091, 68 S. Ct. 855 (1948).

PRAYER

For the foregoing reasons, this petition for a writ of certiorari should be granted. The judgment of the court of appeals should be reversed and the judgment of the district court should be reinstated.

Respectfully submitted,

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PROOF OF SERVICE

COUNTY OF DALLAS }
STATE OF TEXAS }

BEFORE ME, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared SCHUYLER B. MARSHALL, IV, who, being by me duly sworn, upon oath stated:

I, SCHUYLER B. MARSHALL, IV, am not a member of the bar of Supreme Court of the United States; but I am a duly

licensed and practicing attorney and a member of the State Bar of Texas and have been one of the attorneys of record for petitioner herein in all proceedings had in the court of appeals below.

I further state upon oath that upon the 16th day of July, 1971, I served the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, by mailing copies of such Petition, properly addressed, postage prepaid, upon: the counsel for Respondent, Datamedia Computer Service, Inc., Jay M. Vogelson, Steinberg, Generes & Luerssen, 2200 Fidelity Union Tower, Dallas, Texas 75201; the counsel for Petitioner, AVM Corporation, Morris I. Jaffe, Wynne, Jaffe & Tinsley, 1000 LTV Tower, Dallas, Texas 75201.

Schuyler B. Marshall, IV

SWORN TO AND SUBSCRIBED before me by the said Schuyler B. Marshall, IV this the 16th day of July, 1971.

Notary Public in and for
Dallas County, Texas

CAROL VATHIS •
NOTARY PUBLIC
DALLAS COUNTY, TEXAS

APPENDIXES

Page

Appendix A (Opinion Below)
1. Fifth Circuit Opinion (April 19, 1971) A-1

Appendix B (Judgment Below)
1. Judgment (June 20, 1970) B-1

APPENDIX A

(Opinion Below)

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30283

DATAMEDIA COMPUTER SERVICE, INC.,
Plaintiff-Appellant,

v.

AVM CORPORATION AND SHOUP VOTING MACHINE CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

---

(April 19, 1971)

Rehearing Denied May 18, 1971

Before COLEMAN, SIMPSON, and RONEY, Circuit Judges.

COLEMAN, Circuit Judge: In the District Court for the Northern District of Texas Datamedia Computer Service, Inc. filed a Sherman Anti-Trust Act suit against two com-

peting voting machine companies, AVM Corporation and Shoup Voting Machine Corporation. The venue was challenged, Section 12 [1] of the Clayton Act and 28 U.S.C. Section 1391. [2] The District Court appointed a special master to supervise the discovery of venue facts. Upon completion of discovery proceedings, a hearing was held and the complaint was dismissed for lack of venue. Datamedia appeals. We reverse, and remand the case for trial on the merits.

I

The Law

Section 12 of the Clayton Act confers venue for anti trust suits upon any district in which the defendant corporation is transacting business.

The test for transacting business under Section 12 was set forth in *Eastman-Kodak Company v. Southern Photo Materials*, 1927, 273 U.S. 359, 47 S. Ct. 400, 71 L. Ed. 684. The Court stated "that a corporation is engaged in transacting business in a district * * * if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial

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[1] 15 U.S.C.A., § 22. District in which to sue corporation.

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

[2] 28 U.S.C.A., § 1391. Venue generally

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

(d) An alien may be sued in any district.

character." This decision effectively broadened the venue of the district court in anti-trust suits.

It is best demonstrated by the Court itself in *United States v. Scophony Corporation*, 1948, 333 U.S. 795, 68 S. Ct. 855, 92 L. Ed. 1091;

> "Thus by substituting practical, business conceptions for the previous hair-splitting legal technicalities encrusted upon the 'found' — 'present' — 'carrying-on-business' sequence, the Court yielded to and made effective Congress' remedial purpose. Thereby it relieved persons injured through corporate violations of the anti-trust laws from the often insuperable obstacle of resorting to distant forums for redress of wrongs done in the places of their business or residence. A foreign corporation no longer could come to a district perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarters defeat or delay the retribution due."

In *Jeffrey-Nichols Motor Company v. Hupp Motor Car Corporation*, 1 Cir., 1931, 46 F. 2d 623, Hupp had district managers who promoted and solicited sales in much the same manner as AVM's agents. The Court had this to say about transacting business:

> "Under the rule laid down in the Eastman Company case, while a single transaction of business may not be sufficient to establish a venue in a district, it does not require the maintenance of an office or place of business or the presence of agents soliciting or taking orders. * * * The sale of goods is not essential to constitute transacting business. All the steps leading up to or in promoting sales may constitute the transaction of business."

In *Green v. United States Chewing Gum Mfg. Company*, 5 Cir., 1955, 224 F. 2d 369, we held:

> "It will not do to deny substantiality by replying, as said defendant does in its President's affidavit, that

"* * * the gross business of United States Chewing Gum Mfg. * * * represented by shipments to these two companies * * * is a very small part of the total business of my company', for if that were the rule, we would have different tests of substantiality applying to different corporations according to their size; a large corporation could, with impunity, engage in the same acts which would subject a smaller corporation to jurisdiction and venue. We agree with Judge Allan K. Grim of the Eastern District of Pennsylvania that the test is rather, whether or not the sales would appear to be substantial from the average businessman's point of view? Sunbury Wire Rope Manufacturing Company v. United States Steel Corporation, E.D. Pa., 1955, 129 F. Supp. 425, 427."

II

The Facts

A. *AVM*

AVM is a Delaware Corporation with its principal place of business in Jamestown, New York. It maintains no office or place of business in the Northern District of Texas, nor does it have any employee or agent residing in the district. AVM Corporation and its predecessors have been in the voting machine business since 1895. It is the largest producer of voting machines in this Country. It existed as Automatic Voting Machine Corporation from 1925 to 1958, when it was acquired by Rockwell Manufacturing Company. AVM was operated as a division of Rockwell until 1964, when it became a separate entity as a Rockwell spin-off.

Since 1936 AVM, or its direct predecessors, have made numerous sales of voting machines in the Northern District of Texas. M. O. Doolittle, Executive Vice-President of AVM, admitted in deposition that AVM, or its predecessors, sold within the forum district forty-four voting machines in 1936, one hundred twenty machines in 1940, one hundred fifty

machines in 1946, seventy-five machines in 1952, seventy-five machines in 1960, and one hundred voting machines in 1963. As indicated by the dates the sales have generally occurred in Presidential election years or in the so-called "off-year" elections. The largest volume of sales has occurred in the Presidential election years.

AVM's sales in the forum district declined after the Presidential election year of 1964. In this year AVM sold to Dallas County one hundred voting machines at a price of $178,200. Since that time AVM has sold within the forum district only one used voting machine for a price of $1500. In addition to this sale AVM submitted a bid to Dallas County for the sale of four hundred eighty six voting machines at a price of $1,019,628, less rental credit of $45,000. However, this bid was unsuccessful, since the contract was awarded to Datamedia Corporation on a bid of $260,400. Had AVM received the Dallas County award that sale would have represented approximately 10% of its gross sales of $9,600,000 for 1968.

Though AVM has made only one sale in the forum district since 1964, it has continued to solicit business in the area. The Corporation employed Bert Evans in 1967 as the Manager for the Southwest Region, which includes the forum district. His job was to solicit voting machine sales. During 1967 and 1968 Evans made 37 business trips to the forum district, which resulted in the sale of the used voting machine in 1968. Prior to this time Harold Green had been employed by AVM as a resident agent in the forum district in 1965 and 1966. He did not sell any voting machines, but received $33.00 commission for the machine Evans sold in 1968.

In the years 1967 and 1968 AVM's agents or representatives made 49 separate business trips for a total of 81 days to the Northern District of Texas. In addition to these trips Joseph M. Shelton appeared twice before the Dallas County Commissioner's Court. At these appearances he pointed out alleged shortcomings of Datamedia's machines and recommended AVM's machines to the Court.

Finally, AVM's Product Manager, A. V. Martin, makes at least one stop a year in Dallas County to check on any

problems the County has with the machines. Pursuant to these problems AVM has conducted $3,226.17 worth of repair services from 1963 through 1967.

The above is the sum total of AVM's business activities within the Northern District of Texas. When analyzing these activities it must be remembered that the voting machine business is unusual in that most sales are made only every two years with the largest volume every four years. In such an industry solicitation is an essential element. It is readily apparent that AVM could not pop in on potential customers once every two or four years and hope to compete.

B. *Shoup*

Shoup Voting Machine Corporation and its predecessors have been engaged in the voting machine business since 1893. The Company was known as the Shoup Company and did not sell its first voting machine until 1927. In 1929 the Company was incorporated in New Jersey.

In 1931 or 1932 a new company incorporated in Delaware as the Shoup Voting Machine Corporation. This corporation acquired the voting machine rights from the Shoup Company for which they paid royalties for seventeen years. Shoup Voting Machine Corporation was taken over by different persons and reincorporated in New York in 1954. This lasted for two years until General Battery Corporation acquired Shoup in 1956. General Battery operated Shoup until 1965 when it was sold and incorporated in Pennsylvania as the Shoup Voting Machine Company. This is its present status.

Shoup began its business activities in the forum district in 1963. In this year Shoup submitted to Potter County a bid to provide eighty to one hundred ten voting machines at $1,723 each. In May, 1964, Shoup supplied Tarrant County with 430 voting machines for a one year rental of $21,500 on a lease-purchase agreement. It is undisputed that in 1965 Tarrant County exercised its purchase option and bought the machines for $691,440, less rental. Also, in August, 1964, Shoup supplied Tarrant County with twenty additional ma-

chines on the same lease-purchase agreement. Again it is undisputed that Tarrant County exercised their option in 1965 and purchased the machines for $32,160, less rental. Since 1965 the only sales made by Shoup in the forum district were $430 for parts in 1966, $430 for parts in 1967, and $4,635 for parts in 1968. However, in July, 1968, Shoup submitted to Tarrant County a bid for one hundred voting machines at a purchase price of $1,823 per machine. This bid was unsuccessful.

Shoup retains Jim Dulaney Machinery Company of San Antonio as an independent sales representative. Dulaney has made no sales in the forum district. In 1968, Dulaney wrote letters to counties within the district, but these were not answered. Although it is clear that Shoup's agents or representatives made several trips to the forum district from 1964-1968, the exact number for each year is not ascertainable. Some of the trips claimed by the appellant in fact included trips made to other places outside of the Northern District of Texas.

In 1967, Ransom Shoup, an officer of Shoup Voting Machine Corporation, appeared before the Dallas County Commissioner's Court to attempt to sell Shoup machines to Dallas County at some future date. At this meeting he testified that Shoup could not submit a bid to Dallas County because it did not manufacture a large enough machine.

III

The Decision

We are here dealing with an industry which, by its very nature, makes sales, and can expect to make sales, only at intervals, governed largely by the periodical nature of the electrical process. Between times it must remain active to secure business as it arises. Thus the facts must be evaluated in that context.

Appellees contend that the decision of the District Court rested upon its findings of fact, hence the finding that AVM

and Shoup were not transacting business in the district when the suit was filed is entitled to shelter of the "clearly erroneous" umbrella. *Hilliard v. C.I.R.*, 5 Cir., 1960, 281 F. 2d 279, does not support this view. We there held:

> "This Court is, of course, freed from the clearly erroneous rule where there is no conflict as to the evidence and the question becomes one as to the legal inferences to be drawn from undisputed facts."

From the facts hereinabove enumerated we are entirely persuaded that this case falls within the teachings of *Jeffrey-Nichols, supra,* and *United States Chewing Gum, supra.* It necessarily follows, in our opinion, that both appellees were transacting business in the Northern District of Texas within the meaning and purport of Section 12 of the Clayton Act at the time this suit was filed.

Accordingly, the judgment of the District Court is reversed and the case remanded for trial on the merits.

REVERSED and REMANDED.

APPENDIX B

(Judgment Below)

In the

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-3062-A

DATAMEDIA COMPUTER SERVICE, INC.

v.

AVM CORPORATION AND
SHOUP VOTING MACHINE CORPORATION

ORDER OF DISMISSAL

At a pretrial conference held on July 19, 1970, came on for determination the motions of the defendants, AVM Corporation and Shoup Voting Machine Corporation, to dismiss this action because venue is not properly laid in the Northern District of Texas; and the Court, having duly considered the pleadings, the evidence, and the briefs and argument of counsel, finds as follows:

(1) Plaintiff, Datamedia Computer Service, Inc. (hereinafter "Datamedia-Texas"), was incorporated under the laws of Texas on October 28, 1968.

(2) Defendant AVM Corporation (hereinafter "AVM") is a Delaware Corporation with its principal place of business in Jamestown, New York.

(3) Defendant Shoup Voting Machine Corporation (hereinafter "Shoup") is a Pennsylvania corporation with its principal place of business in Bala Cynwyd, Pennsylvania.

(4) Plaintiff Datamedia-Texas' counsel and lawyers associated with him are the incorporators, directors and stockholders of Datamedia-Texas.

(5) None of the acts alleged to have been committed by defendants in violation of the antitrust laws of the United States appear to have occurred after the date of incorporation of plaintiff, Datamedia-Texas, on October 28, 1968.

(6) Plaintiff, Datamedia-Texas, claims the right to maintain this action for alleged antitrust acts of defendants prior to incorporation of plaintiff on October 28, 1968, under a Purchase Agreement, dated October 31, 1968, whereby it acquired assets of a New York Corporation, Datamedia Corporation, having its principal office and place of business in Binghampton, New York.

(7) Neither defendant AVM nor defendant Shoup maintains an office or place of business in the Northern District of Texas, nor does either have any employee or agent residing in this district; and, so far as the evidence indicates, neither AVM nor Shoup ever has maintained an office or place of business in this district nor had any employee or agent residing in the Northern District of Texas.

(8) AVM has made no substantial sales in the Northern District of Texas since 1964.

(9) Since 1964, AVM has made only one isolated sale in this district, of a used voting machine, for a consideration of $1500.00, which sale occurred in 1968, whereas the total sales volume of AVM in that year was approximately $9,600,000.00.

(10) Except for the sale referred to in the preceding finding, there has been no activity by AVM in the Northern District of Texas since 1964, except for occasional solicitation by personnel of AVM not resident in the Northern

District of Texas and the maintenance of machines sold in previous years.

(11) Shoup has made no substantial sales in the Northern District of Texas since 1965.

(12) Since 1965, sales by Shoup in the Northern District of Texas have been of parts for voting machines amounting to $430.00 in 1966, $435.00 in 1967, and $4,635.00 in 1968; there were no sales by Shoup in this district in 1969. During the years in question the annual sales of Shoup ranged from in excess of $5,000,000.00 to more than $9,000,000.00.

(13) Except for the sales of parts referred to in the preceding finding, there has been no activity by Shoup in the Northern District of Texas since 1965, except for occasional solicitation by personnel not resident in the Northern District of Texas.

(14) Ransom F. Shoup, an officer of defendant Shoup, appeared before the Dallas County Commissioners in July, 1967, and testified on that occasion that Shoup could not submit bids to Dallas County because it did not manufacture voting machines of the size required by said county.

And it appearing to the Court that neither AVM nor Shoup was transacting business in the Northern District of Texas at the time this action was filed, or at the time the injury to plaintiff is alleged to have occurred, within the meaning of 15 U.S.C. 22, that neither of the defendants was doing business in Texas at such times, within the meaning of 28 U.S.C. 1391, that venue in this action is not conferred by any of the provisions of the general venue statutes, 28 U.S.C. 1391 et seq.; and it appearing that plaintiff, Datamedia-Texas, objected to transfer of this action in the interest of justice, under 28 U.S.C. 1406(a) or 1404(a), to the Western District of New York, in which it could have been brought, tendered alternatively by both defendants at the pretrial conference, it is, therefore,

ORDERED, ADJUDGED and DECREED that the motions of defendants, AVM and Shoup, to dismiss this action

for lack of venue in the Northern District of Texas be and they hereby are granted and this action is dismissed; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the stipulated fees and expenses of the Special Master appointed herein in the sum of $1500.00 shall be taxed as costs, one half to be paid by plaintiffs and one half to be paid by defendants herein, upon entry of this Order.

SIGNED and ORDERED ENTERED this 20th day of June, 1970.

JOE E. ESTES

Chief Judge
United States District Court

BRIEF FOR THE RESPONDENTS IN OPPOSITION

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
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ROBERT SEAVER, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-95

SHOUP VOTING MACHINE CORPORATION,
Petitioner,

v.

DATAMEDIA COMPUTER SERVICE, INC.,
Respondent.

NO. 71-128

AVM CORPORATION,
Petitioner,

v.

DATAMEDIA COMPUTER SERVICE, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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In the

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-95
NO. 71-128

AVM CORPORATION AND SHOUP VOTING MACHINE CORPORATION,

Petitioners,

v.

DATAMEDIA COMPUTER SERVICE, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

Respondent, Datamedia Computer Service, Inc., prays that the Petitions for Writs of Certiorari filed by AVM Corporation ("AVM") and Shoup Voting Machine Corporation ("Shoup") be denied.

This case involves only a differing view of admitted venue facts which are fully stated in the opinion of the Court of Appeals. There is really no significant issue of law for this Court to consider. The Court of Appeals has not made a legal judgment inconsistent with decisions of this Court or in conflict with other Circuits.

The issue presented by Respondent to the Court of Appeals was:

> Whether a continuous period of sales of voting machines, service *and solicitation* within the Northern District of Texas by AVM, Shoup, and predecessor corporations of each, constitute "transacting business" under Clayton Act, Section 12. [Emphasis added].

The Court of Appeals merely held that the District Court erred in not considering the cyclical nature of sales in the voting machine business and the substantial, *continuing* sales solicitation activities of AVM and Shoup within the Northern District of Texas. As an example of AVM's sales solicitation activities that the District Court ignored, the Court of Appeals pointed out, 441 F. 2d at 607:

> AVM submitted a bid to Dallas County for the sale of four hundred eighty six voting machines at a price of $1,019,628, less rental credit of $45,000. However, this bid was unsuccessful, since the contract was awarded to Datamedia Corporation on a bid of $260,400. Had AVM received the Dallas County award that sale would have represented approximately 10% of its gross sales of $9,600,000 for 1968.

Numerous visits to county purchasing officials, bid submissions and related solicitation activities by AVM continue to this day.

As the Court of Appeals observed, 441 F. 2d at 607:

> When analyzing these activities, it must be remembered that the voting machine business is unusual in that most sales are made only every two years with the largest volume every four years. In such an industry solicitation is an essential element. It is readily apparent that AVM could not pop in on potential customers once every two or four years and hope to compete.

Shoup is in the same position as AVM although the duration of its business activities in the forum district is not as long as AVM's: From 1936 to 1968, Dallas exclusively used AVM voting machines (without competing bids from Shoup); Fort Worth has used Shoup voting machines since it discarded the exclusive use of paper ballots in 1964 (without competing bids from AVM).

Considering both the historic sales made in the forum district by AVM and Shoup and their substantial, continuing solicitation activities, the Court of Appeals properly held that AVM and Shoup are "transacting business" in the Northern District of Texas.

Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927); *United States* v. *National City Lines*, 334 U.S. 583 (1947) and *United States* v. *Scophony Corp.*, 333 U.S. 795 (1948) articulate clear standards to guide lower courts in their consideration of venue issues in antitrust cases. This is but one of many, many venue cases that have followed *Scophony*. The lower courts have had no difficulty applying *Scophony* to varying factual circumstances. There is no need for the legal concepts involved to be again considered by this Court.

Respondent wishes to get on with the merits of the case which was brought to recover damages for injuries sustained by it, after its incorporation, occasioned by Petitioners unlawful efforts to preclude Respondent's entry into the voting machine industry.[1]

The Complaint was filed March 14, 1969. In July, 1969, the District Court limited discovery to venue facts and appointed a Special Master to take evidence. Venue discovery was directed to be completed by September 22, 1969, but the District Court did not hear the venue motions until June 19, 1970. This appeal resulted from the District Court's decision dismissing the case for lack of venue, a decision that the Court of Appeals quite rightly reversed.

Voters in Dallas who have used AVM voting machines continuously since 1936 and voters in Fort Worth who have used Shoup voting machines for several years would be amazed to learn that AVM and Shoup were not "transacting business" in the forum district. Those voters would agree with the Court of Appeals, 441 F. 2d at 608, that:

> . . . Both appellees were transacting business in the Northern District of Texas within the meaning and purpose of Section 12 of the Clayton Act *at the time this suit was filed.* [Emphasis added].

[1] AVM's Petition argues the facts extensively. It contends that Respondent seeks damages for injury suffered by another. That is not true. Besides, the case at this time should not be concerned with the merits, but with venue only.

Accordingly, Respondent urges that the Petitions for Writs of Certiorari filed by AVM and Shoup be denied.

Respectfully submitted,

Original Signed By
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CERTIFICATE OF SERVICE

I, JAY M. VOGELSON, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Brief of Respondent In Opposition on counsel for Petitioners, by depositing same in the United States mails, postage prepaid, on August 10, 1971, addressed to Mr. Morris I. Jaffe, 1000 LTV Tower, Dallas, Texas 75201, counsel for AVM; and Mr. Jerry L. Buchmeyer, 2300 Republic National Bank Building, Dallas, Texas 75201, counsel for Shoup.

Original Signed By
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